Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Petition for Rulemaking	)	
to Amend 47 C.F.R. § 76.1003 --	)	RM No. 9097
Procedures for Adjudicating	)	
Program Access Complaints	)	

TO: The Commission

COMMENTS OF AMERICAST IN SUPPORT OF PETITION FOR RULEMAKING OF AMERITECH NEW MEDIA, INC.

CORPORATE MEDIA PARTNERS
d/b/a/ *americast*™

CRAIG A. NEWMAN
Senior Vice President and
General Counsel
BRUCE D. GELLMAN
Associate General Counsel
Corporate Media Partners
10880 Wilshire Boulevard, Suite 1750
Los Angeles, California 90024
(310) 234-1400

JONATHAN D. BLAKE
KURT A. WIMMER
ERIN M. EGAN

Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-7566
(202) 662-6000

Its Attorneys

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Summary

Americast is working across the United States to assemble programming packages that will be competitive with those offered by entrenched cable operators. In the course of these efforts, Americast has been forced to litigate under the Commission's rules in attempts to obtain access to programming demanded by American consumers. Both our efforts to roll out competitive multichannel video systems and our litigation efforts at the Commission have convinced us that the Commission's rules must be strengthened to ensure quick results, permit meaningful discovery, and authorize damage awards to discourage anticompetitive behavior.

First, the Commission should adopt a rule to specify that a staff decision on program access and price discrimination complaints must be made within 45 days of the close of the official pleading cycle. Empirical evidence demonstrates that the current decisionmaking process requires an average of 12 months to complete, with some complaints requiring up to 30 months for decision. A rule imposing a concrete period for decision will impose necessary discipline on the parties and create a process under which both sides can be assured of a swift result.

Second, the rules should require limited document discovery in place of the ineffective "discretionary" approach now employed. Program access and price discrimination complaints inevitably place the complainant, the potential competitor, at a severe disadvantage because it has access to almost none of the critical information necessary to prove its complaint. This information is in the exclusive possession of the programming suppliers and the entrenched cable operators with which they are likely in league. We propose that the Commission's rules provide that (1) a document discovery request limited to the relevant contracts be served with the complaint; (2) the staff decide 10 business days after the filing of the answer if the complainant is entitled to discovery; and (3) the defendant serve the relevant documents 10 business days after that determination.

Finally, the lack of a damage remedy fatally undermines the effectiveness of the Commission's rules. Programmers denying access to crucial programming or wrongfully discriminating in price are rewarded by the current procedures; if the sole remedy that can be awarded is the access or fair prices that were required months or even years earlier, the defendant is permitted to reap the monetary and competitive benefits of those months or years of wrongful behavior with impunity. Congress clearly provided the Commission with authority to issue damage awards in enacting Section 628, which permitted the Commission to craft "appropriate remedies" for the violation of its rules. Because it is black-letter law that the category of "remedies" includes monetary damages, this explicit grant of authority empowers the Commission now to craft a specific rule permitting damage awards to aggreived complainants. The Commission also should craft a rule providing specifically for forfeitures under Title V of the Act, consider whether it has authority to require punitive damages, and consider whether violations of program access and price discrimination rules should be taken into account when programmers and affiliated cable systems renew Commission licenses.

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INTRODUCTION

Corporate Media Partners d/b/a/ *americast*™ ("Americast") is a new venture owned by subsidiaries of Ameritech Corporation, BellSouth Corporation, GTE Corporation, SBC Communications Inc., Southern New England Telecommunications Corporation (collectively, the "Telephone Company Partners") and The Walt Disney Company. These comments reflect the views of the Telephone Company Partners of Americast in support of the petition for rulemaking of Ameritech New Media, Inc. ("Ameritech"). These comments do not reflect the views of The Walt Disney Company.

The Americast venture was formed to acquire, package, develop and market programs, programming services, and other forms of content for distribution over competitive hardwire or wireless multichannel video distribution systems. Americast is working across the United States to assemble programming packages that will be competitive with those offered by entrenched cable operators.[1/] Access to highly demanded programming is the single most important

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[1/] Americast represents entities that now have authorization to provide competitive multichannel video programming services to more than 230 communities across the United States and are attempting to enter these markets.

element in achieving this goal. In the process of this work and our litigation to obtain effective access to programming that is essential to the public we will serve, it has become increasingly clear to us that vertically integrated program owners and licensees will favor entrenched cable interests if not constrained by law and Commission policy. We are filing these comments because of the paramount importance of program access to our efforts to bring competition to the video marketplace in the United States and because our direct and in-depth experience with the Commission's current rules has convinced us that these rules are insufficient to promote competition and must be strengthened. Uncompromising enforcement of the provisions that Congress crafted in Section 628 is simply essential to the ability of new entrants to succeed and even survive.

Americast wholeheartedly supports the efforts of Ameritech to expedite the process by which the Commission resolves program access complaints under Section 628 of the Communications Act of 1934. The limitations of the Commission's program access procedures are a significant obstacle to competition in the delivery of multichannel video programming. We file these comments to (1) urge the Commission to address this situation by expeditiously issuing a notice of proposed rule making to implement improvements to Section 76.1003 of its rules and (2) provide certain additional proposals for the Commission to include in its notice of proposed rule making.

ARGUMENT

I. THE COMMISSION SHOULD ISSUE A NOTICE OF PROPOSED RULE MAKING EXPEDITIOUSLY TO PERMIT NEW COMPETITORS TO HAVE EFFECTIVE ACCESS TO PROGRAMMING IN ACCORDANCE WITH THE WILL OF CONGRESS.

Congress adopted the program access rules as part of the 1992 Cable Act for the express purpose of promoting competition in the multichannel video marketplace.[2/] As Congress correctly recognized in 1992, programming vendors who control the distribution of multichannel video programming have the ability to prevent new entrants from entering the video distribution market: "'Without fair and ready access on a consistent, technology-neutral basis, an independent entity . . . cannot sustain itself in the market.'"[3/] Congress accordingly required the Commission to promulgate rules to enable new entrants to obtain valued programming at nondiscriminatory rates, terms and conditions from vertically integrated cable operators and programmers.[4/]

As demonstrated by recent congressional hearings, true competition in the video marketplace has yet to develop. The Commission recently echoed this fact, noting the "very limited number of instances where incumbent cable system operators face competition from

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[2/] H.Rep.No. 628, 102d Cong., 2d Sess., at 30 (1992). Noting the "failure" of competition to emerge as anticipated with the passage of the Cable Communications Policy Act of 1984, Congress sought prompt solutions in the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Act"). *See id.* at 27 ("[a] principal goal . . . is to encourage competition from alternative and new technology, including competing cable system[s], wireless cable, direct broadcast satellite, and satellite master antenna television services."); *id.* at 44 ("the Committee believes that steps must be taken to encourage further development of robust competition in the video programming marketplace."); S. Rep. No. 92, 102d Cong., 1st Sess., at 1 (1991) ("[t]he purpose of this legislation is to promote competition in the multichannel video marketplace.").

[3/] S. Rep. No. 92, 102d Cong., 1st Sess. 26 (1991) (quoting testimony of National Rural Telecommunications Cooperative).

[4/] H.R. Rep. No. 862 (Conference Report), 102d Cong., 2d Sess., at 27 (1992).

MVPDs offering services with very similar attributes."[5/] Although the Commission has "reaffirmed" its "commitment to follow Congress's clear mandate in both the 1992 Act, and most recently, the 1996 Act to promote competition as quickly as possible,"[6/] the Commission's current rules and practices are structurally insufficient to foster competition in the marketplace. We urge the Commission to put teeth into its regulations implementing Section 628.

The Commission should immediately act to strengthen its regulations by promptly issuing a notice of proposed rule making discussing the proposals of Ameritech, those additional proposals contained in these comments, and the staff's own proposals for improving the process by which program access complaints are adjudicated.[7/] This process is of paramount importance to new entrants such as Americast, which are working to deploy competitive video systems but are handicapped in their ability to do so by a lack of fair access to programming at nondiscriminatory prices.

[5/] *See* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 96-133, FCC 96-496, at 7 (Jan. 2, 1997).

[6/] *Id.* at 37.

[7/] Without question, the Commission's staff has gained valuable expertise in adjudicating program access complaints and undoubtedly has its own frustrations with the current process and its own ideas for improvements. We encourage the staff to include its own proposals in the notice that should be issued in response to Ameritech's petition.

II. THE COMMISSION'S PROGRAM ACCESS COMPLAINT PROCEDURES MUST BE STRENGTHENED TO ENSURE QUICK RESULTS, PERMIT MEANINGFUL DISCOVERY, AND AUTHORIZE DAMAGE AWARDS TO DISCOURAGE ANTICOMPETITIVE BEHAVIOR.

A. Empirical Evidence on the Length of Time Needed To Adjudicate Program Access Disputes Demonstrates That Improved Procedures Are Necessary To Ensure Expedited Review.

In promulgating Section 628 of the Telecommunications Act, Congress directed that the Commission "provide for an expedited review of any complaints" filed under the section.[8/] In response, the Commission established a pleading cycle that runs for 50 days and resolved "to keep additional pleadings to a minimum to comply with the statutory directive for an expedited adjudicatory process."[9/] The Commission, however, imposed no limit on the length of time it may take to render a decision on a program access complaint. As a consequence, the time required to litigate a program access complaint has proved to be far too long to provide effective relief for new entrants seeking to launch a competitive service in the quickly moving video marketplace.

The lack of expedited review of program access complaints is clear. Since the Implementation Order,[10/] thirty-one Section 628 complaints have been filed with the Commission. The Commission has decided ten of these complaints, in a process that has

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[8/] 47 U.S.C. § 548(f)(1).

[9/] 47 C.F.R. § 76.1003.

[10/] *See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 8 F.C.C. Rcd. 3359 (1993) (the "*Implementation Order*").

required an average of twelve months.[11/] Fourteen of the thirty-one complaints have been settled by the parties, eight of which were pending at the Commission for more than eleven months at the time settlement was made public.[12/] And of the six Section 628 complaints that remain pending with the Commission, four have been pending for more than ten months.[13/] (One complaint has been dismissed.) Certainly, this is not "expedited review."[14/] Nor does it promote competition as Congress intended with Section 628.

When a program access complaint is not quickly resolved, the costs of the delay are borne by the new competitors who are denied non-discriminatory access to programming or are required to pay unlawfully high rates and by the public that is denied the recognized benefits of competition. Particularly for new entrants, delays in providing relief can be tantamount to denying relief. Congress recognized this fact in enacting Section 628:

[11/] As Exhibit A indicates, some complaints have required a substantial amount of time to resolve. *See American Cable Company v. Telecable of Columbus, Inc.*, CSR 4198-P (decision released August 29, 1996; complaint filed December 10, 1993) (33 months); *Cross-Country Cable, Inc.v. C-Tec Cable Systems of Michigan*, CSR 4414-P (decision released March 5, 1997; complaint filed September 14, 1994) (29 months). To be sure, the reasons for the length of time required to resolve these complaints could be myriad; by proposing an administrative deadline for resolving complaints in these comments, we do not wish to imply that the fault lies solely with the Commission. Imposing a firm date by which the staff will resolve complaints will impose a discipline on the parties as well (preventing, for example, the tactic of filing a lengthy series of unauthorized pleadings to delay a staff decision).

[12/] *See* Exhibit A.

[13/] *See* Exhibit A. Americast filed a program access complaint over five months ago that has yet to be decided. *See Corporate Media Partners v. Rainbow Programming Holdings, Inc.*, CSR 4873-P (filed December 6, 1996).

[14/] *See* 47 U.S.C. § 548 (f)(1) ("The Commission's regulations shall -- (1) provide for the expedited review of any complaints made pursuant to this section . . .").

> The bill provides for an expedited administrative remedy . . . . The goal of this provision is to have programming disputes resolved quickly and without imposing undue costs on the involved parties. Without such a remedy, start-up companies, in effect, might be denied relief in light of the prohibitive cost of pursuing an antitrust suit.

S. Rep. No. 92, 102d Cong., 1st Sess. at 22-23. This is precisely the problem faced by Americast in its efforts to obtain rights to regional sports and other critical programming from Rainbow Programming Holdings, Inc.[15/] Lacking a decision on its program access complaint filed with the Commission, Americast has had to decide whether to delay introduction of service or launch new systems at a severe competitive disadvantage. In either case, competition is postponed, a result at odds with the purpose behind Section 628: "to promote the public interest, convenience, necessity by increasing competition and diversity in the multichannel video programming market."[16/] The Commission should establish procedures that reflect the urgency of program access issues, as Congress intended in 1992.

We believe that the Commission must impose a fixed time period after the close of the pleading cycle within which a staff decision must be rendered. An appropriate rule could provide, for example, that a staff determination must be released within 45 days of the close of the official pleading cycle.[17/] The Commission and Congress have recognized the need for

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[15/] *See Corporate Media Partners v. Rainbow Programming Holdings, Inc.*, CSR 4873-P (filed December 6, 1996).

[16/] *See* 47 U.S.C. § 548(a).

[17/] It is important, we believe, that this date for staff action not be tied to the last pleading filed with the Commission concerning the complaint because such a procedure could reward the filing of unauthorized pleadings with the Commission. Rather, the time should run from the filing of the plaintiff's reply, the last pleading officially recognized by the Commission's rules. (Under the document discovery provisions we propose below, the time for discovery would precede the filing of the reply; accordingly, no adjustment to the time period for staff action would be necessary for cases in which document discovery is allowed.)

such procedures in other areas where the needs of the marketplace demand expedited decisions. The Commission has embraced statutory deadlines established by Congress with respect to several types of complaints, including Section 614 and Section 615 complaints involving violations of carriage of commercial and noncommercial television stations (120 days of filing); Section 260 complaints involving material financial harm to providers of telemessaging services (must be decided within 120 days of filing); Section 271 complaints against Bell operating companies (90 days of filing); and Section 275 complaints involving material financial harm to providers of alarm monitoring services (120 days of filing). Indeed, it is common practice for administrative agencies to impose deadlines upon themselves even when Congress has not required the imposition of such deadlines.[18/]

By rendering swift decisions on program access violations the Commission will finally send a clear message to programmers that anti-competitive behavior will not be tolerated in the video programming marketplace. This change in the Commission's rules will be an important step toward fostering a competitive multichannel video marketplace.

[18/] *See, e.g.*, 7 C.F.R. § 110.8(h)(13)(i)(3) (Department of Agriculture requires officer presiding over complaints for violations of record keeping on restricted use of pesticides to decide complaint within thirty days after hearing is held); 12 C.F.R. § 5.50 (Office of the Comptroller of Currency imposes several deadlines upon itself with respect to deciding notices filed by national banks concerning a change in control); 15 C.F.R. § 922.50(c)(2) (National Oceanic and Atmospheric Administration requires hearing officers to decide appeals of administrative actions concerning National Marine Sanctuary permits within sixty days after record for hearing closes); 21 C.F.R. § 101.70(j)(4) (Food and Drug Administration imposes 270 day time limit on itself for publication of a final rule in a health claim proceeding).

B. The Rules Should Require Document Discovery and Provide Efficient and Meaningful Opportunities for Parties to Utilize Discovered Facts.

Program access and price discrimination complaints inevitably place the complainant, the potential competitor, at a severe tactical disadvantage because it has access to almost none of the critical information necessary to prove its complaint. This information is in the exclusive possession of the programming suppliers and the entrenched cable operators with which they are likely in league. Accordingly, the major barrier to a complainant's ability to establish a case against a programmer that is denying access to programming or charging discriminatory prices is the complainant's inability to review, and the programmer's refusal to disclose, the critical documents concerning the programming at issue. As Congress recognized in establishing program access procedures, these documents are necessary for both the Commission and complainants.[19/] Without such information it is virtually impossible for complainants to build, much less prove, a discrimination case against a programmer. And the Commission, having access only to defendants' self-serving accounts of price discrepancies, certainly cannot adequately decide the issues at hand unless it reviews the programmer's relevant contracts.

The Commission's current rules concerning discovery are inadequate to permit either complainants or the Commission to have sufficient information to prosecute or resolve program access complaints. Under the current procedures, the Commission has "discretion" to permit discovery:[20/]

[19/] Congress permitted the Commission in Section 628 to "establish procedures" to "collect such data, including the right to obtain copies of all contracts and documents reflecting arrangements and understandings alleged to violate this section." 47 U.S.C. § 548(f)(2).

[20/] 47 C.F.R. § 76.1003(g)(1) ("staff may in its discretion order discovery").

> [I]f the staff determines that the complainant has established a *prima facie* case, and further information is necessary to resolve the complaint (e.g., additional information is necessary to quantify a permissible differential) the staff will issue a ruling to that effect. The staff will then determine what additional information is necessary, and will develop a discovery process and timetable to resolve the dispute expeditiously.[21/]

This procedure, by its vagueness, its lack of a meaningful timetable and its failure to apply across the board, shields programmers from the inquiry necessary to further the cause of promoting competition. Its inadequacy is demonstrated conclusively by the fact that the staff has *never once* required defendants to provide additional information in the course of considering all the program access complaints filed since 1993. This process, which does not permit complainants to have access to the crucial documents that may be needed to establish their allegations, is significantly biased in favor of defendant programmers.[22/]

One rule change that would permit complainants to gain access to these documents is to require limited document discovery as a matter of course.[23/] The Commission may be concerned, however, that complainants could abuse this procedure by filing frivolous complaints to acquire competitive information about programming costs. Accordingly, we propose that the

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[21/] *Implementation Order* at 3420.

[22/] Deciding cases without reviewing the relevant documents favors defendants. *See Beaumont Branch of the NAACP v. F.C.C.*, 854 F.2d 501, 509 (D.C. Cir. 1988) ("it is fundamentally unfair for [the] FCC to dismiss a challenge where the challenging party has seriously questioned the validity of a representation and the defending party is the party with access to the relevant information.").

[23/] A possibility highlighted by Ameritech is to require a defendant programmer to provide the critical documents in its answer. This proposal could be easily adopted, as Ameritech points out, by changing the word "may" in 47 C.F.R. § 76.1003(d)(6)(iii) to "shall." Expanding the information that must be submitted in an answer would give a complainant the bare minimum to establish its claims and provide the decisionmaker with some information upon which to decide a case. It is also in accord with furthering the Commission's goal of a streamlined process and Congress's directive of meaningful expedited review. If the Commission decides not to adopt the Ameritech proposal, however, it should at the very least modify its rules to strengthen complainants' ability to timely receive crucial documents after establishing a *prima facie* case.

Commission adopt strict procedures for requiring discovery when the staff has determined that a complainant has, in fact, demonstrated a *prima facie* case. This determination by the staff must be made quickly at a time certain in the pleading process, and it should be followed by a meaningful opportunity to bring discovered facts to the attention of the Commission. This proposal would be consistent with the Commission's current approach but would make it specific and mandatory enough finally to be effective.

The Commission should require by rule that the complainant serve its complaint with an attached document discovery request by hand upon a specific, identified member of the Commission's staff (or, less preferably, a specified bureau) at the same time it is served on the defendant. This initial document request should be limited to the relevant contracts and other documents that demonstrably relate to programming rates and terms and conditions of access.[24/] Within 10 business days of the filing of the answer to the complaint, the staff member should determine whether, taking the defendant's answer into account, the complainant has sufficiently pled a *prima facie* case against the defendant. This approach would be consistent in principle with the procedures used by the Commission to trigger evidentiary rights in equal employment cases, political broadcasting complaints, common carrier complaints and other procedures.[25/]

[24/] Of course, this narrow initial rule cannot fit all cases regardless of complexity. In some cases, the complainant may request additional documents or other discovery because of the unique circumstances surrounding the dispute. The staff should be empowered to assess such additional requests (as it is today under Section 76.1003(g)(1)) to permit additional discovery. But the proposed rule presumptively permitting *initial* discovery of the documents that are virtually *certain* to be essential to the dispute should not be subject to the delays and uncertainties that underlie the current rule and practice.

[25/] *See, e.g., Bilingual Bicultural Coalition on Mass Media v. F.C.C.*, 595 F.2d 621 (D.C. Cir. 1978) (requiring a hearing in those instances where complainant shows a statistical disparity between the available minority workforce and a station's minority employment coupled with a languishing affirmative action plan); *see also* 47 U.S.C. § 309(d) (requiring a hearing after the Commission has proceeded through a two-step process: first, it must determine whether complainants' allegations sufficiently show that a grant of an application would be *prima facie* inconsistent with the public interest, convenience and

After this threshold determination by the staff, the defendant would be required to produce the specific documents requested by the complainant (which request, of course, the Commission's staff would have discretion to review and narrow if necessary).[26] The defendant should be required to comply with the document request -- of which it would have had substantial notice by the time of the staff's decision to permit discovery -- within a brief period of time after the staff's order. We would suggest 10 business days from the date of the staff's decision to require discovery. After the defendant has provided the relevant documents, the complainant would have an opportunity to use those documents to support its case in the filing of its reply.[27] The pleading cycle then would be closed,[28] and the time period for the Commission's staff to make a decision would begin to run.

C. The Commission's Program Access Rules Must Permit the Imposition of Economic Damages in Appropriate Cases.

The Commission's rules currently do not permit monetary damages against programmers that have been found liable for a program access violation. The import of this fact is that

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necessity; second, the Commission is to determine whether "on the basis of the application, the pleadings filed, or other matters which it may officially notice . . . a substantial and material question of fact is presented." If a material question of fact is presented, the Commission is to conduct a hearing).

[26] This element of FCC staff review should counter any concerns that complainants would file complaints merely to obtain information. In the unlikely event that the staff does encounter a baseless program access complaint that was filed merely to obtain sensitive commercial information, it will have full authority to deny discovery and, in appropriate cases, subject the complainant to sanctions for the filing of a frivolous complaint. *See* 47 C.F.R. § 76.1003(q) (1996) (filing of a frivolous complaint "shall constitute an abuse of process subject to appropriate sanctions").

[27] It would be necessary for the Commission to make an appropriate adjustment to the time for filing of the reply for cases in which initial document discovery has been requested. *See* 47 C.F.R. § 76.1003(e) (1996) (reply due 20 days after service of answer).

[28] Of course, the defendant already would have had a full opportunity to use the documents that are in its own possession in crafting its response to the complaint. There thus would be no need to create further authorized pleadings to be used by a defendant to characterize its own documents.

programmers currently denying access to crucial programming or wrongfully discriminating in price effectively are rewarded by the Commission's program access complaint procedures. Without the threat of any monetary sanction whatsoever for prolonging the complaint process, program vendors are encouraged rather than discouraged to continue unfair and discriminatory practices. Facing no penalty, a cable-affiliated programmer can delay negotiations and postpone the filing of a program access complaint indefinitely. If the only remedy that can be awarded is the access or fair prices that were required by the Commission's rule months or years earlier, a defendant is permitted to reap the monetary and competitive benefits of those months or years of wrongful behavior with impunity. An effective damage remedy will eliminate the perverse incentives that are an inadvertent consequence of the current regulatory structure, encourage above-board behavior by vertically integrated cable programmers, encourage fair settlements and, above all, promote the competition that Congress envisaged in crafting Section 628.

1. Congress Granted The Commission Full Authority To Craft An Effective Damage Remedy To Enforce Section 628.

The Commission's authority to award damages for violations of its rules implementing Section 628 is clear on the face of the statute. Section 628 grants the Commission broad authority "to order appropriate remedies, including, if necessary, the power to establish prices, terms, and conditions of sale of programming to the aggrieved multichannel video programming distributor."[29/] There can be little question that legislative language permitting an administrative agency to "order appropriate remedies" must, virtually by definition, include the ability to order an award of damages; it is black-letter law that the category of "remedies"

[29/] 47 U.S.C. § 548(e)(1).

includes "damages."[30/] The legislative history of Section 628, similarly, provides simply that the Commission "shall order appropriate remedies" without stating or implying any limitation on the Commission's discretion to award damages.[31/] As the Commission held in 1994, it is impossible to read Section 628 as granting the Commission anything less than full authority to compensate aggrieved complainants for violations of its program access rules.[32/] "Because the statute does not limit the Commission's authority to determine what is an appropriate remedy, and damages are clearly a form of remedy, the plain language of this part of Section 628(e) is consistent with a finding that the Commission has authority to afford relief in the form of damages."[33/] Accordingly, the Commission has full authority under Section 628 to enter damage awards to enforce its rules.

Congress' explicit grant of authority to the Commission to enter all "appropriate remedies" is sufficient, on its own, to authorize damages for violations of the Commission's program access and nondiscriminatory pricing rules. Section 628, however, further provides that these remedies "are in addition to and not in lieu of the remedies available under Title V

[30/] *See, e.g.*, 1 DOBBS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION 277 (1993) (discussing principles of "damage remedy").

[31/] *See* H. Conf. Rep. No. 862, 102d Cong., 2d Sess. 93 (1992). The Conference Report made this statement in describing the House provision concerning program access, which is the language that ultimately was adopted by Congress. *See First Reconsideration Order*, 10 FCC Rcd at 1911 n.42. The conferees further made clear that they "expect the Commission to address and resolve the problems of unreasonable cable industry practices, including restricting the availability of programming and charging discriminatory prices," *id.*, an expectation that belies any intent to limit the weapons in the Commission's arsenal to non-damage remedies.

[32/] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 10 FCC Rcd 1902, 1905 (1994) ("*First Reconsideration Order*") ("[T]he Commission determines that it does have the authority under Section 628 to award damages for violations of the program access rules[.]. .").

[33/] *Id.* at 1910-1911.

or any other provisions of this Act."[34/] Thus, Section 628 clarified that the Commission retains full authority under its broad general powers under the Act.[35/] The courts have affirmed that the Commission has broad authority pursuant to these general provisions.[36/] This prong of Section 628 thus provides further support for the Commission's authority to award damages against programmers operating in violation of its rules.

2. The Commission Should Craft An Effective Damage Remedy To Enforce Section 628.

When the Commission found that a damages remedy for program access violations was "not necessary" in adopting its regulations in 1994, it emphasized that "if, contrary to our expectations, it is brought to the Commission's attention that the current process for resolving complaints is not working, the Commission will consider revisiting this issue."[37/] The evidence of anti-competitive behavior in the marketplace demonstrates that now is the time for the Commission to exercise its full remedial authority available under the Communications Act and impose damages for violations of Section 628.

The threat of damages liability and other penalties simply is required to bring a programmer that is in violation of the Commission's rules into line. Even where the issue is a close one, a potential violator may seek a negotiated agreement or attempt to speed an

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[34/] 47 U.S.C. § 548(e)(2). Title V of the Act explicitly grants the Commission the authority to sanction entities for violations of its rules. *See* 47 U.S.C. § 501-510.

[35/] *See, e.g.*, 47 U.S.C. § 154(i) (Commission "may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions").

[36/] *See Mobile Communications Corp. v. FCC*, 77 F.3d 1399 (D.C. Cir.), *cert. denied*, 117 S. Ct. 81 (1996).

[37/] *First Reconsideration Order* at 1904.

administrative decision in order to reduce its exposure to damages. Further, imposing liability for damages is the only way the Commission can establish a regulatory scheme under which parties reasonably can be expected to settle disputes -- under the current rules, few defendants have any incentive to settle a dispute because the process rewards them for delaying access to programming, and the vast majority of disputes can thus be expected to proceed to resolution even when liability is clear. Permitting damages in the program access context will be consistent with the Commission's overall view toward efficiently resolving violations of its rules and will be in line with the Commission's long and successful history in imposing damages in other complaint proceedings for violations of nondiscrimination requirements.[38/]

The Commission should establish, by a specific and clear rule, that monetary damages will be available for the violation of its program access rules.[39/] This approach will be no different from any other complaint process before the Commission, in which parties seeking damages are permitted to prove the extent to which violations of the Commission's rules have imposed economic damages upon them. Parties should be permitted to allege and prove the economic harm that has befallen them by virtue of the defendants' wrongful withholding of

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[38/] Section 202, for example, imposes fines for certain unjust or unreasonable discrimination by common carriers. Section 206, as well as the corresponding provision of the Commission's rules (47 C.F.R. § 1.722), require common carriers to pay damages and reasonable counsel fees for any person injured as a result of unjust or unreasonable discrimination as a result of its acts. And Section 209 permits the Commission to award damages against a common carrier for discriminatory practices.

[39/] Americast agrees that the Commission may bifurcate liability and damages issues. One possibility is to allow the complainant to decide whether to allege damages in its complaint initially or reserve its right to file a supplemental complaint for damages after liability has been determined. This practice is currently employed with complaints against common carriers. *See* 47 C.F.R. § 1.722(b) (1996).

programming or imposition of discriminatory pricing, under provisions similar to those used by the Commission in handling other similar types of damage complaints.[40/]

3. The Commission Should Consider Appropriate Fines And Other Remedies In The Course Of This Rule Making Proceeding.

In addition to authorizing the Commission to impose monetary damages, Congress emphasized that these "appropriate" remedies are "in addition to and not in lieu of the remedies available under Title V or any other provision of the Act."[41/] Title V, permitting forfeitures for willful violations of any rule or regulation imposed by the Commission, can be an effective deterrent to program access violations. Yet the Commission has never administered such fines. And the Commission's vague reference to Title V in its rules provides little, if any, threat to potential wrongdoers.[42/] Accordingly, Americast urges the Commission to revise its rules to highlight the Commission's clear intent to provide for forfeitures and the specific penalty in dollar figures that the Commission will impose in appropriate cases.

We also believe the Commission should explore in the proceeding commenced by the subject petition (1) whether adjudicated anticompetitive behavior should be treated as raising serious questions of fitness to be a Commission licensee at the time of renewal of FCC licenses and (2) whether the Commission has authority to impose punitive damages in those limited and egregious cases of willful price discrimination or denial of programming in which exposure to economic damages may be an insufficient deterrent.

[40/] *See, e.g.*, 47 C.F.R. § 1.722(a) (1996).

[41/] 47 U.S.C. § 548(e)(2).

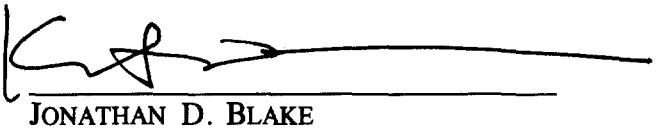
[42/] *See* 47 C.F.R. § 76.1003(s)(2) (1996).

CONCLUSION

We are now on the cusp of a competitive new era in video programming delivery, but this vigorous new competition simply cannot develop absent a clear and convincing message from the Commission that violations of Section 628 will be dealt with promptly and seriously. We urge the Commission immediately to adopt rules that streamline and strengthen the process for resolving program access complaints under Section 628.

Respectfully submitted,

CORPORATE MEDIA PARTNERS



CRAIG A. NEWMAN
Senior Vice President and
General Counsel
BRUCE D. GELLMAN
Associate General Counsel
Corporate Media Partners
10880 Wilshire Boulevard, Suite 1750
Los Angeles, California 90024
(310) 234-1400

JONATHAN D. BLAKE
KURT A. WIMMER
ERIN M. EGAN

Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-7566
(202) 662-6000

Its Attorneys

July 2, 1997

PROGRAM ACCESS COMPLAINTS[1/]

File No.	Complainant	Defendant	Type	Date Filed	Status	Length of Time
PENDING SECTION 628 COMPLAINTS						
CSR-4684-P	Satellite Receivers	Cable News Network	rate discrimination; unfair practices	2/6/96	pending	15 mos. 24 days
CSR-4685-P	Turner Vision	Cable News Network	rate discrimination; unfair practices	2/6/96	pending	15 mos. 24 days
CSR-4686-P	Consumer Satellite Systems	Cable News Network	rate discrimination; unfair practices	2/6/96	pending	15 mos. 24 days
CSR-4802-P	British-American Communications	Prime Ticket Network; Prime Sports West; Liberty Sports; Liberty Media; Tele-Communications, Inc.; Southwest Cable Television, Inc.; Century Communications Corp.; and Continental Cablevision	unfair practices generally, and discrimination in prices, terms or conditions. BAC also alleged that the PTN/Century Cable contract was a non-exempt, illegal exclusive contract	7/19/96	pending	10 mos. 11 days
CSR-4873-P	Corporate Media Partners, Inc.	Rainbow Programming Holdings, Inc.	price discrimination, unfair practices	12/6/96	pending	5 mos. 24 days
CSR-4983-P	Bell Atlantic Video Services, Co.	Cablevision and Rainbow Programming Holdings, Inc.	refusal to deal	3/28/97	pending	2 mos. 2 days
Total number of pending complaints: 6				**Average length of time (rounded): 11 months**		

1/ The chart does not consider Section 628 filings for a Public Interest Determination.

File No.	Complainant	Defendant	Type	Date Filed	Status	Length of Time
			DECIDED COMPLAINTS			
CSR-4188-P	Electric Plant Board, City of Glasgow, KY	Turner Network Cable Sales, Inc.	illegal enforcement of exclusive contract	1/6/94	denied 9/6/94	9 mos.
CSR-4198-P	American Cable Company and Jay Copeland	TeleCable of Columbus	exclusive contract; refusal to sell	12/10/93	denied 8/29/96	32 mos. 29 days
CSR-4230-P	Hutchens Communications, Inc.	TCI Southeast and TCI of Georgia	unfair practices, leased access violations	3/8/94	dismissed 9/6/94	5 mos. 28 days
CSR-4242-P	Liberty Cable Company, Inc.	Courtroom Television Network	exclusive contract; refusal to sell	12/9/93	dismissed 8/2/94	8 mos. 24 days
CSR-4414-P	Cross Country Cable, Inc.	C-Tec Cable Systems of Michigan, Inc.	C-Tec's discount rate plan impeded Cross Country's ability to offer its services in franchise areas	9/14/94	denied 3/5/97	29 mos. 19 days
CSR-4478-P	CellularVision of NY, L.P.	SportsChannel Associates	refusal to sell, security concerns	2/22/95	granted 8/24/95; Petition for Review filed 9/20/95, denied 3/12/96	6 mos. 2 days (initial decision)
CSR-4648-P	Interface Communications Group, Inc.	Rainbow Programming Holdings, Inc. and American Movie Classics Co.	Rainbow unreasonably refused to sell AMC to Interface for distribution	1/16/96	dismissed 9/13/96	8 mos. 27 days
CSR-4690-P	Corporate Media Partners	Continental Cablevision, Inc. and Home Box Office	exclusive dealing	2/29/96	denied 7/3/96; Petition for Reconsideration filed 8/2/96, denied 3/17/97	4 mos. 4 days (initial decision)
CSR-4695-P	Digital Broadband Applications Corporation	Cablevision Systems Corp. and Rainbow Programming Holdings, Inc.	unfair practices and non-price discrimination	3/12/96	dismissed 9/13/96	6 mos. 1 day
CSR-4721-P	Residential Communications Network of Massachusetts	Rainbow Programming Holdings, Inc.	unfair, deceptive acts and practices; rate discrimination	4/22/96	dismissed 9/13/96	4 mos. 21 days
			Total number of decided complaints: 10		**Average length of time (rounded): 12 months**	

File No.	Complainant	Defendant	Type	Date Filed	Status	Length of Time
			SETTLED COMPLAINTS			
CSR-4024-P	CableAmerica	Times Mirror Cable Television, Inc.	refusal to sell Arizona Sports Programming	8/10/93	settled; dismissed 9/9/94	12 mos. 29 days
CSR-4233-P	Private Network Cable Systems	SportsChannel Associates	discrimination; refusal to sell	3/7/94	settled; dismissed 9/23/94	6 mos. 16 days
CSR-4240-P	Mid-Atlantic Cable Service Co.	Home Team Sports and Columbia Cable of Virginia	exclusivity, unfair practices and discrimination	3/22/94	settled; dismissed 7/29/94	4 mos. 7 days
CSR-4246-P	Consumer Satellite Systems	Lifetime Television	rate discrimination	3/21/94	settled; dismissed 6/27/94	3 mos. 8 days
CSR-4284-P	Satellite Receivers, Ltd.	United Video Satellite Group	rate discrimination	7/20/94	settled; dismissed 7/1/96	23 mos. 11 days
CSR-4285-P	Consumer Satellite Systems, Inc.	United Video Satellite Group	rate discrimination	7/20/94	settled; dismissed 7/1/96	23 mos. 11 days
CSR-4296-P	Galaxy Satellite Services, Inc.	United Video Satellite Group	rate discrimination	7/28/94	settled; dismissed 7/1/96	23 mos. 3 days
CSR-4297-P	A&L Satellite Inc.	United Video Satellite Group	rate discrimination	7/28/94	settled; dismissed 7/1/96	23 mos. 3 days
CSR-4298-P	Programmer's Clearing House, Inc.	United Video Satellite Group	rate discrimination	7/28/94	settled; dismissed 7/1/96	23 mos. 3 days
CSR 4299-P	American Programming Serv. Inc.	United Video Satellite Group	rate discrimination	7/28/94	settled; dismissed 7/1/96	23 mos. 3 days
CSR-4308-P	National Rural Telecommunications Cooperative	EMI Communications Corp.	rate discrimination	9/9/94	settled; dismissed 9/7/95	11 mos. 28 days
CSR-4736-P	Optel, Inc.	Century Southwest Cable Television, Inc.	refusal to sublicense	4/9/96	settled; dismissed 12/20/96	8 mos. 11 days

File No.	Complainant	Defendant	Type	Date Filed	Status	Length of Time
CSR-4822-P	Tele-TV Media, L.P. and Pacific Bell Video Services	Century Communications Corporation and Prime Ticket Networks	discrimination	9/6/96	settled; dismissed 12/20/96	3 mos. 14 days
CSR-4858-P	Optel, Inc.	Continental Cablevision, Inc.	Continental unreasonably refused to sell programming to Optel	10/31/96	settled; dismissed 3/6/97	4 mos. 6 days
Total number of settled complaints: 14				**Average length of time (rounded): 14 months**		
WITHDRAWN COMPLAINT						
CSR-4628-P	CAI Wireless Systems, Inc.	Cablevision Systems, Inc. and Madison Square Garden Network, Inc.	unfair practices, exclusivity, discrimination	11/22/95	withdrawn; dismissed 3/12/96	3 mos. 18 days
Total number of withdrawn complaints: 1				**Average length of time (rounded): 4 months**		